

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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|-------------------------------|---|-----------------------|
| STATE OF WASHINGTON, |) | No. 62868-2-I |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | |
| |) | |
| LIVIO L. DELLAGUARDIA |) | UNPUBLISHED OPINION |
| aka LIVIO LUIGI DELLAGUARDIA, |) | |
| |) | |
| Appellant. |) | FILED: March 15, 2010 |
| |) | |

Ellington, J. — A jury found Livio Dellaguardia guilty of possession of marijuana with intent to deliver. Dellaguardia concedes that sufficient evidence supports a conviction for possession, but asserts the evidence does not support the conviction for possession with intent to deliver. Because a rational trier of fact could have found intent to deliver beyond a reasonable doubt, we affirm.

FACTS

At approximately 2:20 a.m. on November 17, 2007, Trooper Joseph Zimmer was patrolling I-5 in Seattle. He observed Livio Dellaguardia speeding and drifting back and forth across the lanes of traffic. Trooper Zimmer stopped Dellaguardia. He noticed a strong odor of intoxicants coming from the car.

Trooper Zimmer asked Dellaguardia if he had been drinking and Dellaguardia

said that he had had “a couple” drinks.¹ The trooper asked whether he had smoked marijuana, and Dellaguardia said he had, “a long time ago.”²

Dellaguardia performed the sobriety tests adequately, and the trooper did not believe his driving was impaired by alcohol. But while administering the field breath test, the trooper detected the obvious odor of marijuana. He attempted to place Dellaguardia under arrest for possession of marijuana. Dellaguardia resisted, and Trooper Zimmer warned him he would use his taser if Dellaguardia continued to resist. As Trooper Zimmer reached for his taser, Dellaguardia pulled away from him and bolted across I-5, crossing seven lanes of traffic.

Trooper Zimmer inventoried the contents of Dellaguardia’s car prior to impounding it. The car was a rental. It contained a cell phone and a large black duffel bag behind the back seat. The duffel had four large plastic bags inside, each containing green marijuana. Two of the bags were heat-sealed. The bags contained 3,073 grams of marijuana, with a street value of over \$12,000. There was nothing else in the vehicle except a magazine. The State charged Dellaguardia with possession of marijuana with intent to deliver.

The jury found Dellaguardia guilty as charged.

DISCUSSION

Dellaguardia concedes the evidence supports a conviction for possession, but asserts that the evidence is insufficient to support the conviction for possession with

¹ Report of Proceedings (RP) (Oct. 22, 2008) at 157.

² Id. at 158.

intent to deliver.

Evidence is sufficient if, when viewed in the light most favorable to the State, any rational trier of fact could have found each element of the offense beyond a reasonable doubt.³ A challenge to the sufficiency of the evidence admits the truth of the State's evidence, and "[a]ll reasonable inferences from the evidence must be drawn in favor of the State and most strongly against the defendant."⁴

The elements of possession of a controlled substance with intent to deliver are: (1) unlawful possession (2) with intent to deliver (3) a controlled substance.⁵ Here, the only issue is whether a rational trier of fact could have found the element of intent to deliver beyond a reasonable doubt.

Trooper Zimmer testified that in the past five years he has probably filed about 100 cases involving marijuana charges, and that the amount of marijuana in those cases is typically two to seven grams. Dellaguardia thus possessed approximately 1,000 times the typical amount. Simple possession of large quantities is not, however, sufficient evidence of intent to deliver. "Washington case law forbids the inference of an intent to deliver based on 'bare possession of a controlled substance, absent other facts and circumstances[.]'"⁶ In cases where intent to deliver is inferred from the

³ State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

⁴ State v. Gallagher, 112 Wn. App. 601, 613, 51 P.3d 100 (2002) (citing id.).

⁵ RCW 69.50.401(1); State v. Hagler, 74 Wn. App. 232, 235, 872 P.2d 85 (1994).

⁶ State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993) (quoting State v. Grover, 55 Wn. App. 923, 930, 780 P.2d 901 (1989)). But we have noted, "It appears that at some point, the quantity of drugs could be large enough to raise an inference that the drugs were possessed with intent to distribute." State v. Wade, 98 Wn. App. 328, 340, 989 P.2d 576 (1999).

possession of a quantity of narcotics, courts require at least one additional factor,⁷ which “must be suggestive of sale as opposed to mere possession.”⁸ Convictions for possession with intent to deliver are highly fact specific and the evidence is usually circumstantial.⁹

In closing argument, the prosecutor cited the following evidence to support the element of intent to deliver: (1) the amount of marijuana, (2) the fact that usually when Trooper Zimmer files cases involving marijuana, the amount is two to seven grams of marijuana, (3) the value of marijuana of \$12,292, (4) that Dellaguardia ran away from Trooper Zimmer, and (5) that Dellaguardia was driving a rental car, even though he lived nearby in Renton. Additionally, the jury was aware that two of the large bags were heat-sealed, and the car contained no evidence of implements for personal use. These additional factors amply support the verdict.

As Dellaguardia argues, the fact that a defendant takes flight when asked to stop is not necessarily probative of intent to deliver because it could also be consistent with evading a possession charge.¹⁰ Here however, Dellaguardia had admitted that he had smoked marijuana earlier that day. The fact that he fled across seven freeway lanes to avoid arrest (and the consequent personal search) strongly suggests he was evading more than a simple possession charge.

In addition, Dellaguardia was driving a rental car even though he was close to

⁷ Brown, 68 Wn. App. at 484.

⁸ Hagler, 74 Wn. App. at 236.

⁹ Brown, 68 Wn. App. at 485; State v. Davis, 79 Wn. App. 591, 594, 904 P.2d 306 (1995).

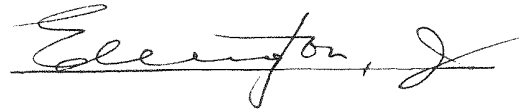
¹⁰ See Wade, 98 Wn. App. at 342.

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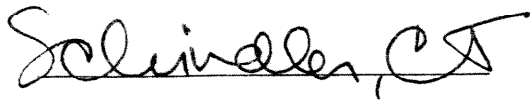
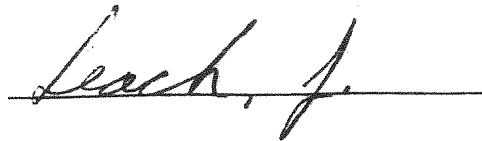
where he lives. Use of a rental car may have an innocent explanation. But in

combination with the large quantity of contraband and the fact that Dellaguardia fled as he did, the fact Dellaguardia was driving a rental car supports an inference he was using the rental because he intended to deliver drugs.

Based on these additional factors, a rational trier of fact could have found the element of intent to deliver beyond a reasonable doubt. We affirm.

A handwritten signature in cursive script, appearing to read "Elenyon, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Schindler, C.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Leach, J.", written over a horizontal line.